Supreme Court, U.S.
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No. 01-1120

In The

Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In its published decision, the Ninth Circuit confuses and misapplies on one hand the well-established doctrines that a corporation may be vicariously liable under respondeat superior and the non-delegability of the duty to comply with the Fair Housing Act, with on the other hand the far different issue of the personal liability of the corporation's owner(s) and officers for the acts of the corporation or its agents. The result is a decision which imposes absolute *personal* liability on corporate owners and officers for an employee's or agent's violation of the Fair Housing Act, regardless of whether or not they personally directed, authorized, or were even aware of the particular acts that occurred. The consequence is catastrophic for all aspects of the real estate industry nationwide.

In his petition, Meyer demonstrated why this Court's review is necessary to resolve the conflict between the Ninth Circuit's decision in this case, and decisions which hold quite directly and clearly that corporate owners and officers are *not* personally liable, absent additional facts related to their direction, authorization, or ratification of the agent's conduct.

In this reply, Meyer explains why each of the arguments asserted by Plaintiffs in their opposition is without merit.

LEGAL DISCUSSION

I.

THE COURT OF APPEALS IMPROPERLY PREMISED PERSONAL LIABILITY OF A CORPORATE OWNER OR OFFICER SOLELY ON THE RIGHT OF CONTROL.

Plaintiffs devote substantial effort in their opposition to demonstrate an uncontested point: owners and officers

of a corporation exercise a right of control over the corporation's agents and employees. For this reason, the *corporation* can be vicariously liable for the torts of its agents and employees. From this premise, Plaintiffs, like the court of appeals, make a leap to conclude that, based *solely* on this right of control, the owner or officer of a corporation can be *personally* liable for the torts of the corporation's agents or employees, whether or not they personally directed, authorized, or were even aware of the acts that occurred. Here, Plaintiffs' analysis, like that of the court of appeals', falters.

To bridge the gap between corporate and personal liability, the court of appeals relied on the doctrine of "non-delegable duty." As explained in the petition, the court of appeals misapplied this doctrine by holding it supercedes established rules of agency law, which require specific acts by the individual officer before personal liability will adhere. See, Pet. at 12-15; see also, amicus brief of the National Association of REALTORS® ("NAR") at 13-19. Plaintiffs, importantly, make no attempt to legitimatize the court of appeals' reliance on this doctrine. Instead, they claim the doctrine was not the basis of, and was unnecessary for, the court of appeals' ruling. Plaintiffs' claim fails for several reasons.

First, Plaintiffs assert:

> "Although in its opinion the court of appeals used the term 'non-delegable' in describing the duty not to discriminate in violation of the Fair Housing Act, it is clear that each of its findings was made on the ground that there was sufficient evidence of an agency relationship between Meyer and Crank and the Triad salespersons based on Meyer's right to direct or control their activities. Thus, Meyer's claim that the court of appeals used a non-delegable duty analysis as a means by which to escape the

> confines of vicarious liability is meritless." Opp. at 17.

The court of appeals' reliance on the doctrine of "non-delegable duty" is in fact manifest throughout the opinion. For example, in setting forth the legal basis for Meyer's personal liability as a corporate owner:

> "While the evidence does not indicate that Crank acted with the approval or at the direction of Meyer, such a finding is not necessary to hold Meyer liable as the sole owner of Triad for breach of a non-delegable duty to comply with the FHA." 258 F.3d 1127, 1133.

Similarly, the court of appeals concluded Meyer's personal liability as a corporate officer could be based on his non-delegable duty:

> "[B]ecause the duty not to discriminate is a non-delegable one, we join other courts in holding that officers can be individually liable for discriminatory acts of corporate employees under their control and management." 258 F.3d at 1134.[1]

Thus, contrary to Plaintiffs' assertion, the court of appeals' decision expanding personal liability of corporate owners and officers regardless of fault cannot be

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[1] One of the "other courts" cited by the Ninth Circuit was the Fifth Circuit Court of Appeals' decision in *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348 (5th Cir. 1979). 258 F.3d at 1134. In *Northside*, the court of appeals upheld a contempt judgment against a real estate corporation and two of its officers for violation of an injunction prohibiting discriminatory housing practices. Importantly, the judgment against the officers was based not on the doctrine of non-delegable duty, nor on the officers' right of control, but on the evidence adduced at trial demonstrating, inter alia, that the officers expressly ordered sales agents to engage in discrimination, and ordered two agents fired for not discriminating. 605 F.2d at 1354.

divorced from its erroneous application of the doctrine of non-delegable duty.

Second, Plaintiffs assert the court of appeals properly concluded that liability of a corporate owner or officer under the FHA can be based *solely* on the owner or officer's right to control the corporation's agents. Opp. at 17-20. This is not, nor should it be, the law. A corporation, although a separate legal entity, can only act through its designated officers. For this reason, the corporation's officers must have the right to control the corporation's agents. Personal liability of the owners and officers, however, cannot be based solely on this right of control. To do so would render the entire corporate structure meaningless and make personal liability limitless.

For this reason, under well-established rules of agency, a corporate officer will not be held personally liable, merely by virtue of his office, for the torts of his corporation or its other agents. Rather, liability must be founded upon specific acts by the individual officer. See, *Lobato v. Pay-Less Drug Stores*, 261 F.2d 406, 409 (10th Cir. 1958); *Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 1141, 1144 (4th Cir. 1975); *Escudo Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980); *Murphy Tugboat v. Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 852 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256, 1263 (9th Cir. 1981); see also, 18B Am.Jur.2d, Corporations, §§ 1877-78.

This fundamental principle of agency and corporation law has been applied regularly to claims brought under the FHA, and those courts which have expressly considered the issue in this context have underscored the need for the owner's or officer's personal participation in torts committed by the corporation or its agents in order for liability to be personally imposed on the owner or officer. See, e.g., *Tillman v. Wheaton-Haven Recreation*

Ass'n, supra, 517 F.2d at 1144; *United States v. Lorantffy Care Center*, 999 F.Supp. 1037, 1045 (N.D. Ohio 1998); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232, 1303-04 (N.D. Ohio 1983); see also NAR amicus brief at 8-13.

The FHA itself neither defines – nor purports to expand – the class of persons who can be sued for alleged discriminatory housing practices. 42 U.S.C. § 3601, *et seq.*[2] Specifically, the FHA does not make corporate owners or officers liable for the torts of the corporation's agents based solely on a right to control. Notably, when Congress has sought to expand personal liability to corporate owners and officers for the wrongs of the corporation it has specifically done so. For example, in the context of antitrust law, 15 U.S.C. § 24 provides in relevant part:

> "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation. . . ."

Congress has demonstrated no such expansionist intent in the FHA. It should not be read into the statute by the courts.

Third, Plaintiffs fail to offer any argument to counter Meyer's showing that the court of appeals' expansion of liability is not warranted by the policy underlying the FHA to prevent discrimination in housing. Pet. at 16-17. A plaintiff is not without recourse under established rules of tort and agency for the alleged discrimination. He or

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[2] The relevant provisions of the FHA – 42 U.S.C. §§ 3610, 3612, and 3613 – are reprinted in the Appendix to the Petition at 41-61.

she can pursue their action against the agent who is directly responsible for the alleged discrimination. Additionally, they can pursue the agent's principal, the corporation, the "one innocent party with the power to control the acts of the agent." *Walker v. Crigler*, 976 F.2d 900, 904-05 (4th Cir. 1992). No legitimate purpose is furthered by allowing a plaintiff to pursue an innocent corporate owner/officer personally as well.

This is demonstrated by the present case, where Plaintiffs' motivation for pursuing Meyer is transparent. Plaintiffs apparently believe that because the corporation's insurance policy excludes coverage for discrimination claims they have been left without a remedy. Plaintiffs' contention they should be allowed to proceed against Meyer because he is a perceived "deep pocket" is repugnant, and in no way furthers the actual laudable policy underlying the FHA.

II.

THE DESIGNATED OFFICER/BROKER OF A CORPORATION IS NOT PERSONALLY LIABLE FOR THE ACTS OF THE CORPORATION OR ITS AGENTS.

A licensed broker, under whose license employees or agents operate, may be liable for the discriminatory actions of those employees or agents. *Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974); *Heights Community Congress v. Hilltop Realty, Inc., supra*, 629 F.Supp. at 1303. Thus, in *Hilltop*, the court held that a licensed broker, in that case a corporation, was "liable for the imputed acts and statements" of those agents operating under the corporation's license in violation of the FHA. 629 F.Supp. at 1303. The Plaintiffs also sought to attach personal liability to the owner/president of the corporation. The court held that, since the agents who committed the discriminatory acts had a "contractual relationship with [the corporation] as

broker and not with [the owner/president] as broker, [the agent's] acts and statements could not be imputed to [the owner/president]." *Id.*, at 1303-04.

In the present case, Meyer submitted evidence which established that he had not held a broker's license as an individual since the early 1980's, i.e., well before the incidents alleged in Plaintiffs' complaint. E.R. p. 48; Supp. E.R. pp. 1-4. From August 1994 through August 1998, Triad was a corporate licensee, with Meyer designated as Triad's officer/broker. Meyer's broker's license was thus valid only as an officer of Triad. E.R. pp. 48-49, 53. Since at least 1994, all of Triad's agents were employed by Triad, and operated under its broker's license. E.R. 55-56, 60.

This evidence established that none of the alleged discriminatory acts were committed by an agent acting under Meyer's individual broker's license. Accordingly, Meyer was properly granted judgment by the district court. *Heights Community Congress v. Hilltop Realty, Inc., supra*, 629 F.Supp. at 1303. Nonetheless, the court of appeals found, and Plaintiffs now argue, that Meyer can be personally liable for the torts of the corporation based solely on his status as the corporation's designated officer/broker. 258 F.3d at 1134-35; Opp. at 20-23. This is incorrect.

The court of appeals' finding, and Plaintiffs' argument, are based on California's statutory scheme for corporate brokers. California Business and Professions Code section 10159.2 provides in relevant part:

> "The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the

> provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required."

This statute does not create a private right of action against an individual based solely upon his status as a designated broker. Rather, section 10159.2 is intended "to include only disciplinary sanctions on the individual broker. Nothing in the statutory scheme of the Real Estate Act, or the plain language of [section] 10159.2, suggests that it creates a private right of action against the designated broker, particularly in light of detailed provisions for disciplinary sanctions set forth in [sections] 10175-10185. The most obvious interpretation of [section] 10159.2 is that it simply extended this disciplinary scheme to apply against designated brokers who failed to properly supervise employees. [Citation.]" *In re Grabau*, 151 B.R. 227, 332 (1993); see also, *Walters v. Marler*, 83 Cal.App.3d 1, 35 (1978) ("Any action by the qualifying broker . . . must be regarded as an action by the corporation and not by the broker as an individual").

Grabau and *Walters* are perfectly consistent with the manner in which the courts, up to this point, have addressed the issue of a broker's liability under the FHA. A broker under contract with its agents has a nondelegable duty to obey the FHA. *Marr v. Rife, supra,* 503 F.2d at 741; *Heights Community Congress v. Hilltop Realty, Inc., supra,* 629 F.Supp. at 211. Yet, under the court of appeals' decision, that is precisely what the California statutory scheme would do by "delegating" the broker's duty to supervise and control to an agent of the corporation, i.e., the designated broker. A more logical interpretation, and one supported by the law, is that the broker under whose license the agents operate – here, undisputably Triad – is the person vicariously liable to third parties for violations of the FHA by the broker's

agents. See, *Hilltop, supra,* 629 F. Supp. at 212 ("Hilltop Realty is liable for the imputed acts and statements of those agents who participated in [the violations of the FHA]. However, since the agents in those violations have a contractual relationship with Hilltop as broker and not with [the corporation's president], their acts and statements may not be imputed to him under *Marr v. Rife*").

In sum, the undisputed evidence established that the real estate license was issued to Triad, with Meyer as the designated corporate officer for Triad. Crank, indeed all Triad agents, were employed by, and licensed as salespersons for, Triad. Therefore, because Triad was the licensed broker, Crank's contractual relationship was with Triad, not Meyer. Thus, Crank's alleged discriminatory acts are imputed to Triad as the broker, and not to Meyer as an individual. Accordingly, Meyer cannot be held personally liable for Crank's alleged misconduct in violation of the FHA. Summary judgment for Meyer was correct and should be affirmed.

III.

THE COURT OF APPEALS' EXPANSION OF LIABILITY IS AN ISSUE OF NATIONAL IMPORTANCE WARRANTING REVIEW BY THIS COURT.

Plaintiffs characterize the court of appeals' expansion of liability for corporate owners and officers as having "no national significance." Opp. at 23. Plaintiffs are incorrect in this assertion.

As demonstrated in detail by amicus curiae, the NAR and the California Association of REALTORS® ("CAR"), the ramifications of the court of appeals' published opinion extend far beyond the catastrophic consequences to Meyer, to the entire real estate industry nationwide. Under the court of appeals' decision, each owner or officer of a real estate corporation – from tiny "Mom and

Pop" operations to national corporate giants – is going to be *personally* liable for the acts of the corporation's agents in violation of the FHA, whether or not they directed, authorized, or even knew of the agent's conduct.

This holding will, without exaggeration, undermine the corporate structure of the entire real estate industry, and open the floodgates of litigation against corporate owners and officers. Such a holding compels further scrutiny by this Court before becoming the law of the nation.

CONCLUSION

For the reasons set forth in the petition and in this reply, Petitioner prays for a writ of certiorari to issue to the Court of Appeals for the Ninth Circuit.

Dated: April 24, 2002

Respectfully submitted,

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